IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lee Cranmer, a sir gle person, Plaintiff, vs. Tucson Police Department; City of Tucson; Chief Richard Miranda; Detective M. Lenard and John Doe Lenard, wife and husband; Officer Mark Spellman and Jane Doe Spellman, husband and wife, Defendants.	)	No. 03-CV-282 TUC JMR ORDER
Lee Cranmer, a single person, Plaintiff, vs. Tyconic, Inc.; Mark Spellman and Jane Doe Speilman, husband and wife; Kathleen Dailey and John Doe Dailey, wife and husband, Defendants.	)	Consolidated No. 04-CV-150 TUC JMR

Pending before this Court is Plaintiffs Motion for New Trial under 59(a), Motion to Correct or Amend Judgment under Rule 59(e), Motion for Relief from Judgment under Rule 60(b), and Plaintiffs Alternative Motion for Reconsideration. Also pending is Plaintiffs Motion for Leave to Amend or Supplement Motion For New Trial.

Background

These cases involve the fraudulent activities of Jeanie Hering, the apparent wife of PlaintiffLee Cranmer, M.D. Tucson Police investigators believed that Plaintiff was Hering's accomplice in the ongoing fraud, and they eventually arrested both on the same day. Hering was convicted, but Plaintiff was never formally charged, and he brought these consolidated lawsuits against the police and Tyconic, the business that assisted the police in Plaintiffs apprehension.

Plaintiff filed his complaints against both sets of Defendants in state court on April18, 2003. Defendants removed the cases to this Court, which the Court consolidated on May 26, 2004. Plaintiff alleged that his warrantless arrest by the City Defendants violated the Fourth Amendment of the U.S. Constitution, Article 2. 1(A)(1) of the Arizona Constitution, and "laws of the State of Arizona." Plaintiff also alleged that in arresting him, the City committed false imprisonment, malicious prosecution, defamation of character, gross negligence, and negligence, and that Spellman's interrogation constituted intentional infliction of emotional distress. Plaintiff alleged that

the Tyconic Defendants, in participating in Spellman's activities, committed false imprisonment, defamation of character, and intentional infliction of emotional distress.

Both sets of Defendants, the City and Tyconic, filed a motion for summary judgment on December 14, 2004. The Court extended, on Plaintiffs motion, the time for Plaintiffs response to February 11, 2005. Plaintiff did not respond, and, on February 18, 2005, Defendants filed a joint request for summary disposition of the motions. The Court did not act on this request. Plaintiff filed his Opposition to Summary Judgment in June 2005 which the Court struck for lateness. Plaintiff filed a motion to reconsider, and on June 15, 2005, this Court vacated its previous order striking Plaintiffs Opposition and directing Plaintiff to submit a memorandum explaining why they should not be stricken. Plaintiff submitted this memorandum on July 1, 2005.

Throughout most of this time Plaintiff was represented by attorney David L. Bjorgaard. Mr. Bjorgaard explained in the July 1,2005 memorandum that he failed to file Plaintiffs Oppositions earlier due to personal circumstances. On June 22, 2005, Plaintiff consulted new counsel, who associated with Mr. Bjorgaard. New counsel learned around this time that an expert in fraud investigation, Gerry Goddard, had been consulted by Mr. Bjorgaard earlier in the case, but had not prepared a report or affidavit. Counsel contacted Mr. Goddard and provided him with needed documents to render an opinion.

On September 12, 2005, this Court granted Defendants' motions for summary judgment. The order was entered and served on counsel on September 27, 2005. On October 7, 2005, Plaintiff filed the current pending motions. At about the time this Court's order granting the motions for summaryjudgment was entered, Mr. Goddard provided his affidavit, and report to Plaintiffs counsel. These documents state, specifically and in detail, that Det. Lenard lacked probable cause to arrest Plaintiff.

Legal Analysis

Plaintiff has filed a Motion for New Trial under 5 9(a), a Motion to Correct or Amend Judgment under Rule 59(e), and a Motion for Relief from Judgment under Rule 60(b).1 Under Fed.R.Civ.P. 59(a), the District Court has the discretion to reopen a judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions. Amendment or alteration of a judgment is also appropriate under Rule 59(e) if (1) the District Court is presented with newly discovered evidence; (2) the District Court committed clear error or made an initial decision that was manifestly unjust; or (3) there is an intervening change in controlling law. Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001). Finally, Rule 60(b) provides for discretionary relief from a final judgment for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; or (3) any reason justifying relief from the operation of the judgment.

Plaintiff s alleged three grounds for relief of judgment are (1) newly discovered evidence; (2) attorney mistake; and (3) manifest injustice.

(1) Newly Discovered Evidence

Plaintiff is attempting to put into evidence the affidavit and report of Gerry Goddard, Plaintiffs alleged expert witness. Plaintiff claims that the report and affidavit are newly discovered evidence' because they did not exist until the date they were created, September 20, 2005.

Plaintiff also filed a motion for reconsideration, in the event that the Court considered the other three motions untimely. However, the Court finds the other three motions timely. Therefore, the Court will not consider Plaintiffs motion for reconsideration.

The analysis under Rule 59 and 60 in regard to new evidence is largely identical. See Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990). The movant must establish that (1) the evidence was discovered after trial; (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage; and (3) the newly discovered evidence is of such magnitude that production of it earlier would lilcely have changed the outcome of the case. Defenders of Wildlife v. Bernal, 204 F.3d 920, 929 (9th Cir. 2000); Feature Realty, Inc., v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003).

"Evidence is not newly discovered under the Federal Rules if it was in the moving party's possession at the time of [the motion for summary judgment] or could have been discovered with reasonable diligence." Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 212 (9th Cir. 1987). The evidence must have been previously unavailable. Defenders of IVild4fe, 204 F.3d at 929. "The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into newly discovered evidence." School District No. IJ, Multnomah County, Oregon, 5 F.3d 1255, 1263 (1993).

The affidavit and report of Mr. Goddard is not "newly discovered." Plaintiffs former and current counsel were aware that Mr. Goddard existed, that he was creating this affidavit and report, and presumably had some idea as to what the report would contain. Yet, Mr. Goddard was never disclosed by former counsel, and Plaintiffs new counsel did nothing to inform the other side of Mr. Goddard's existence or impending report and affidavit. The report and affidavit cannot be considered unavailable simply because Plaintiff's counsel failed to timely disclose Mr. Goddard and obtain this information from him. See Trentacosta v. Frontier Pac. Aircraft Indus., Inc., 813 F.2d 1553, 1557 & n.4 (9th Cir. 1987) (finding that court did not abuse its discretion in refusing to consider affidavits opposing summary judgment filed late); FrederickS. Wyle Professional Corp. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir.

1985) (finding that evidence available to party before it filled its opposition was not newly discovered evidence" warranting reconsideration of summary judgment); Waltman v. International Paper Co., 875 F.2d 468, 473-74 (SthCir. 1989) (finding materials available at time of filing opposition to summary judgment would not be considered with motion for reconsideration).

Further, there is no indication that earlier production of this evidence would have changed the outcome of the case. Much of Mr. Goddard's report is argumentative, speculative, and immaterial to the issues at hand.

(2) Attorney Mistake

Plaintiff claims that an amended or altered judgment is necessary because of attorney conduct. Specifically, Plaintiff claims that because of error on the part of Mr. Bjorgaard,
Plaintiff did not get Mr. Goddard's report and affidavit in time to file it before summary judgment was entered.

Rule 60(b)(1) provides for discretionary relief from a fmal judgment for mistake, in advertence, surprise, or excusable neglect. Relief from judgment may be granted for mistakes by any person and can include an attorney's negligent failure to meet a deadline. Robb v. Norfolk & Western Ry. Co., 122 F.3d 354 (7th Cir. 1997). Otherwise, careful clients

can be penalized for omissions of their careless attorneys. However, as a general rule, parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1). Casey v. Albertson's Inc. 362 F.3d 1254, 1260 (9th Cir. 2004); Pioneer mv. Servs. Co. v. Brunswick Assocs. Ltd F- ship, 507 U.S. 380, 397 (1993) (finding that parties are required to be held accountable for the acts and omissions of their chosen counsel). Neither ignorance nor carelessness on the part of the litigant or his attorney provide ground for relief under Rule 60(b)(1). Allmerica Fin. Ljfe Ins. & Annuity Co. v. Llewellyn, 139 F.3d 664, 666 (9th Cir. 1997). Also, it does not matter that Plaintiff himself might not have been aware that his attorney was not pursuing his ease in a diligent manner. See Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082 (finding that knowledge learned by Plaintiffs former counsel was properly attributable to Plaintiff itself).

Whether Plaintiff is entitled to relief under F.R.C.P. 60(b) is an equitable decision and several factors are considered. These factors include, but are not limited to, "(1) the danger of prejudice to the opposing party; (2) the length of the delay, (3) the reason for the delay and its potential impact on the proceedings; and (4) whether the movant acted in good faith." Laurino, MD. v. Syringa General Hospital, 279 F.3d 750, 753 (9th Cir. 2002).

Plaintiff claims the other parties in this case would not be prejudiced by granting a new trial because the only effect of such relief would be that

the motions would be considered on a full record and proceed to trial. However, Defendants would be prejudiced because they timely completed their discovery before given notice of the existence of Mr. Goddard and were, therefore, not given a chance to take him into account while preparing discovery for this case. Plaintiffs former counsel has already created numerous and lengthy delays in this matter. Defendants would have to incur additional defense costs, as well as a further delay in these proceedings. Further, even if the Court took into consideration Mr. Goddard's report, it would not have precluded summary judgment in this case.

Mr Goddard was not disclosed until 13 months past the deadline for expert disclosure, and Plaintiffs counsel gives no reason for this delay except to say that former counsel was remiss. Plaintiffs current counsel became aware of Mr. Goddard in June 2005 and did nothing to inform the other side or the court of Mr. Goddard's existence or of his expected report and affidavit until after judgment was rendered in October 2005. There was no telephone call or correspondence to the Defendants advising of the existence and pending disclosure of an expert report from Gerry Goddard, nor was any motion filed with the court seeking an extension of the disclosure deadline or to supplement or amend the record. Plaintiffs counsel fails to provide any explanation for this omission. Plaintiffs former and current counsel's conduct in these proceedings provide some indication of bad faith.

(3) Manifest Injustice

Plaintiff also appears to argue that the judgment should be amended because the Court decision creates a manifest injustice. Under 59(e), amendment or alteration of judgment is appropriate if the District Court made an initial decision that was manifestly unjust. Zimmerman, 255 F.3d at 740. Rule 60(b)(6) allows a court to vacate a judgment for any "reason justif~ring relief from the operation of the judgment." That rule "has been used sparingly as an equitable remedy to prevent manifest injustice." UnitedStates v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.1993). To receive Rule 60(b)(6) relief a moving party must "show both injury and that circumstances beyond its control prevented timely action to protect its interests." Id; Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998). Neglect or lack of diligence is not to be remedied through Rule 60(b)(6). United States v. RG & B Contractors, Inc., 21 F.3d 952, 956 (9th Cir.1994).

After a review of the relevant evidence and law, Plaintiff has not presented this Court with anything that would persuade the Court to reconsider its previous ruling under Rule 59(e) or Rule 60(b)(6).

Motion to Amend or Supplement

On May 9, 2006, Plaintiff filed a motion for leave to amend or supplement the above motions. Plaintiff seeks to provide additional evidence of Mr. Bjorgaard's "abandonment" of other clients and to show that Mr. Bjorgaard may have been under a disability that made it impossible for him to represent Plaintiff in this case. Plaintiff alleges that

this disability amounts to "extraordinary circumstances" that form the basis for relief from judgment under F.R.C.P. 60(b). Plaintiff has not shown cause for the Court to grant this motion. Even if the Court allowed amendment of Plaintiffs motions, Plaintiff alleges no specific way in which Mr. Bjorgaard's alleged disability has affected Plaintiffs case. The only error that Mr. Bjorgaard has allegedly committed, from the pleadings, is failure to disclose Mr. Goddard in a timely manner. However, current counsel became aware of Mr. Goddard's presence in June 2005, yet failed to disclose Mr. Goddard's existence until October 2005, and still fails to provide any explanation for this delay. Further, as discussed previously, Mr. Goddard's report would not have precluded summary judgment in this matter.

Accordingly,

IT IS ORDERED that Plaintiffs Motion for New Trial under 59(a), Motion to Correct or Amend Judgment under Rule 59(e), Motion for Relief from Judgment under Rule60(b), and Plaintiffs Alternative Motion for Reconsideration [Doc. # 54] are DENIED.

IT IS FURTHER ORDERED that Plaintiffs Motion for Leave to Amend or Supplement Motion for New Trial [Doc. # 80] is DENIED.

DATED this 7th day of July, 2006.

S/
John M. Roll
Chief United States Dist. Judge